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Arbitration clauses, supply and distribution agreements, trademarks and unfair competition

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The Barcelona Court of Appeals recently issued two noteworthy decisions regarding the scope of arbitration clauses included in (i) a supply agreement between a number of milk producers and a food corporation[1] and (ii) a distribution agreement between a manufacturer of chemical products, equipment and machinery and a distributor that was entitled to use some of the manufacturer's trademarks[2]. Both arbitration clauses referred to any dispute arising out of or related to "*the interpretation or performance of the agreement*".

First case: milk supply agreement.

A food corporation (CAPSA) notified its suppliers of its decision to stop purchasing milk from them. The suppliers claimed CAPSA had a dominant position in the milk distribution market which resulted in them being "economically dependent" on CAPSA and, thus, CAPSA's decision amounted to an unfair competition conduct. For this reason, the milk producers requested from a commercial court of Barcelona an interim measure ordering CAPSA to keep buying milk from them for a period of one year.

CAPSA argued that the commercial court was not competent to deal with the matter because of the arbitration clause included in the supply agreement. The commercial court, however, adopted the interim measure and directed CAPSA to keep buying milk from the claimants.

CAPSA appealed the decision before the Barcelona Court of Appeals, which decided that the commercial court was competent because the action brought by the milk producers "*directly derive[d] from the application of the unfair competition rules*" and was founded on a "*situation of economic dependence*"; it found that the arbitration clause did not encompass this sort of disputes, arising out of legal provisions, but only those regarding the "*fulfilment or breach of the contractual provisions*".

Second case: distribution agreement.

After several years of contractual relationship, the manufacturer decided to terminate the distribution agreement due to an alleged contractual breach by its distributor. However, the distributor kept using the trademarks for the marketing of its own goods. The manufacturer brought a claim against its distributor for

[1] Decision of the Barcelona Court of Appeals nº 82/2019, dated 6 May 2019.
[2] Decision of the Barcelona Court of Appeals nº 102/2019, dated 3 June 2019.

trademark infringement and unfair competition before a commercial court of Barcelona.

The distributor argued that, pursuant to the arbitration clause contained in the distribution agreement, the commercial court was not competent; the manufacturer replied that the commercial court was indeed competent because the claim was not based on the distribution agreement, but on the infringement of its trademark rights and on the act on unfair competition. The commercial court endorsed the distributor's allegations and the manufacturer challenged the decision of the commercial court.

The Barcelona Court of Appeals upheld the challenge. Seemingly inconsistently with its decision, it found that the use of the trademarks by the distributor derived from the distribution agreement and, therefore, determining whether or not the distribution agreement had been properly terminated could "possibly" amount to a "prejudicial matter" with regard to the alleged violations of trademark rights and the act on unfair competition. However, the Court of Appeals held this did not mean that the arbitration clause applied to the action at hand, given that it was not about the "*interpretation or performance*" of the distribution agreement, but about trademark rights and unfair competition. As a result, the Court of Appeals decided that the commercial court was competent.

These cases[3] show it is important that arbitration clauses are drafted in broad terms and refer specifically to disputes relating to trademarks, anticompetitive conducts, etc., as otherwise, the claimant may have the option to circumvent the arbitration clause and resort to State courts in this kind of cases.

[3] See also the judgment of the EU Court of Justice of 21 May 2015 in case C-352/13 and our note of January 2016 (*A breach of a contractual obligation can fall outside the scope of the arbitration agreement when the legal action is based on unfair competition legal provisions*) regarding the decision of the Madrid Court of Appeals nº 187/2015, dated 25 September 2015.